Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

As AT&T shows in Part I, the Commission should allow telecommunications carriers to choose between an opt-out mechanism and an opt-in mechanism. In its initial comments, AT&T demonstrated that an opt-in requirement is irreconcilable with the text of section 222 and the First Amendment of the United States Constitution. The overwhelming majority of commenters agree with AT&T. In fact, only three commenters have defended the opt-in rule. Of these three, only two present any argument whatsoever, only one seriously addresses the constitutionality of the rule, and none offers any record evidence of the sort that the Commission requested in its Notice and that the Tenth Circuit held to be a prerequisite to renewing an opt-in requirement. Because the Tenth Circuit concluded that an opt-in requirement could not be sustained on the record before the court, and because the opt-in proponents have not supplemented the record with any meaningful evidence or analysis, the Commission must permit opt-out approval.

As AT&T shows in Part II, section 272 prohibits BOCs from discriminating between their affiliates and non-affiliates in the provision of CPNI. In its initial comments, AT&T demonstrated that the plain text of section 272 forbids discrimination in the provision of "information," a term which indubitably includes CPNI. The Commission's contrary conclusion – which assigns two conflicting meanings to the word "information" – is indefensible, and indeed, the BOCs have not defended it. Instead, the BOCs have presented a litany of alternative arguments in an attempt to defeat the plain language of section 272. These arguments are no more persuasive now than they were when the BOCs first made them in 1996. The Commission did not adopt these arguments in its previous CPNI Orders, see, e.g., Second Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of the

Telecommunications Act of 1996, 13 FCC Rcd. 8061, 8175 n.564 (1998) ("Second Report and Order"), and the Commission should not do so here.

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Pursuant to the Commission's Second Further Notice of Proposed Rulemaking, FCC 01-247, released on September 7, 2001 ("Notice"), and section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits the following reply comments on telecommunications carriers' use of customer proprietary network information ("CPNI") and the implementation of the non-accounting safeguards of sections 271 and 272 of the Communications Act of 1934, as amended.[1]

[1] A list of commenters and the abbreviations used to identify them is attached as Appendix A.

I. THE COMMISSION SHOULD ALLOW TELECOMMUNICATIONS CARRIERS TO CHOOSE BETWEEN AN OPT-OUT MECHANISM AND AN OPT-IN MECHANISM.

The comments overwhelmingly – and indeed, almost unanimously – demonstrate that an opt-out mechanism best promotes the Commission's policy goals. Not only is a notice and opt-out process "consistent with the procompetitive objective of . . . the Commission," BellSouth at 7, but it enables companies to "market new and innovative telecommunications services," Verizon Wireless at 5, and facilitates one-stop shopping, see Verizon at 4. Moreover, because an opt-out mechanism "arms consumers with the information they need to make informed choices and exercise affirmative control over their CPNI," WorldCom at 5, and because "[m]arket forces" deter carriers from misusing CPNI, Cingular at 2, an opt-out mechanism fully protects customers' privacy. It is thus "not surprising that in the over two years since the [Tenth Circuit's decision], no serious problems associated with carriers' use of their customers' CPNI have arisen," Sprint at 4. In fact, "[a]n opt-out approach . . . eliminate[s] certain carrier practices viewed by some customers as privacy intrusive," such as frequent phone calls attempting to obtain affirmative consent for the use of CPNI and non-targeted solicitations offering customers products of no interest to them. See Verizon Wireless at 5.

In contrast, an opt-in requirement would impose "significant costs" on the telecommunications industry. CenturyTel at ii. The requirement would "unduly limit[] a carrier's right to communicate with its subscriber base, id., "dam[] information flows and creat[e] uncertainty among carriers and customers." Qwest at 21-22. As the Commission itself has noted, a "prior authorization [or opt-in] rule would vitiate a [carrier's] ability to achieve efficiencies through integrated marketing to smaller customers." Report and Order, In the Matter

of Computer III Remand Proceedings: Bell Operating Company Safeguards; Tier 1 Local Exchange Company Safegaurds, 6 FCC Rcd. 7571, ¶ 85 n.155 (1991).[2]

Policy considerations are not the only basis for rejecting an opt-in requirement. As AT&T demonstrated in its opening comments, an opt-in requirement conflicts with the text of section 222. See AT&T at 2-3. Section 222(c)(1) broadly permits use of CPNI with the "*approval* of the customer." § 222(c)(1) (emphasis added). In isolation, the meaning of "approval" may be unclear, but words in a statute must be construed in light of their context, see, e.g., Tyler v. Cain, 121 S. Ct. 2478, 2482 (2001), and interpreted so as not to render other statutory terms superfluous, Circuit City v. Adams, 121 S. Ct. 1302, 1308 (2001). Interpreting "approval" to require an express act would indeed render other language in section 222 superfluous. Section 222(f), which addresses authority to use wireless location information, specifically speaks of *"express* authorization." Construing "approval" (a synonym of authorization) to mean "express approval" would render the word "express" in section 222(f)

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[2] See also Memorandum Opinion and Order, Motion of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling that Section 22.903 and Other Sections of the Commission's Rules Permit the Cellular Affiliate of a Bell Operating Company to Provide Competitive Landline Local Exchange Service Outside the Region in which the Bell Operating Company is the Local Exchange Carrier, 11 FCC Rcd. 3386, 3395 (1995) ("[T]his proposed integration of wireless and landline services offers substantial benefits to consumers by avoiding duplicative costs, increasing efficiency, and enhancing [Southwestern Bell's] ability to provide innovative service."); Memorandum Opinion and Order on Reconsideration, In re Applications of Craig O. McCaw and American Telephone and Telegraph Company, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 10 FCC Rcd. 11786, 11795, 11799 (1995) ("The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company . . . to obtain information about various services . . . ."), affirmed sub. nom SBC Communications, Inc. v. FCC, 56 F.3d 1484 (D.C. Cir. 1995) (explicitly permitting AT&T to bundle long distance and cellular service).

redundant; Congress could simply have said "authorization" or "approval" and achieved the same effect. Section 222 thus shows that, when Congress wants to mandate express customer consent, it indicates as much by using the word "express." Because section 222(c)(1) does not speak of "express approval," such approval is not necessary.

Moreover, as AT&T explained in its initial comments, even if the word "approval" were ambiguous in its context, the Commission should construe it to encompass implied approval, so as to avoid constitutional problems. See AT&T at 3-9. The Court of Appeals for the Tenth Circuit strongly suggested that an opt-in requirement would run afoul of the First Amendment. See US West v. Federal Communications Commission, 182 F.3d 1224, 1240 (1999). The court concluded that: (a) "CPNI regulations restrict speech" by precluding telecommunications companies from tailoring and targeting their speech to a particular audience, id. at 1232; (b) the appropriate constitutional test is the one for commercial speech under Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), see id. at 1233; and (c) on the record before the court, the government failed to meet its burden under Central Hudson, see US West, 182 F.3d at 1234-39. In vacating the Commission's CPNI order, the Tenth Circuit made clear that deferential administrative-law standards are inapplicable and that the Commission must consider whether an opt-in requirement can satisfy the Central Hudson test. See id. at 1240 & n.15. As AT&T showed in its initial comments, an opt-in requirement cannot survive Central Hudson scrutiny, because such requirement does not directly and materially advance the government's interest in either privacy or competition, and because the requirement is not narrowly tailored. See AT&T at 5-9.

The comments strongly support AT&T's position regarding both the text of section 222 and the application of Central Hudson. Almost all of the commenters – representing a broad

array of interests – emphatically agree with AT&T that the Commission cannot sustain an opt-in requirement. See, e.g., NTCA at 4 ("Providing carriers with the flexibility to choose either an 'opt-in' or 'opt-out' approach for obtaining permission to use CPNI, combined with current notice requirements about subscribers' rights to limit CPNI use, will satisfy the Tenth Circuit's remand and sufficiently address the Commission's competitive concerns."); OPASTCO at 11-12 ("[A]n opt-out approach is the most narrowly-tailored, free-market based approach to protecting CPNI."); SBC at 14 ("The bottom-line is opt-out approval constituted approval prior to the Act and has been used by the Commission and other industries subsequent to the Act to adequately safeguard consumer privacy interests. There simply is an insufficient record to demonstrate otherwise or show proper tailoring."); USTA at i ("The opt-out approach is rational, less restrictive than the opt-in approach, sufficiently protects customer privacy and is consistent with customer expectations."); Verizon Wireless at 12 ("This requirement for 'express prior authorization' in Section 222(f) establishes an opt-in framework *only* for the use of wireless *location* information, and stands in clear contrast to Congress' decision merely to require 'approval' for use and disclosure of all other CPNI.").[3]

Of the twenty-five comments that were filed with the Commission, only three defend an opt-in requirement, and only two (Mpower and EPIC) contain any analysis whatsoever.[4]

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[3] Almost all of the other commenters agree as well. See ALLTEL at 4-6; AT&T Wireless at 2-9; BellSouth at 6-8; CTIA at 6-7, 13; CenturyTel at 3-12; Cingular at 2-7; DMA at 3-6; IntelliOne at 14-16; Nextel at 3-7; Qwest at 5-22; Sprint at 2-7; VarTec at 2-3; Verizon at 2-7; WorldCom at 4-13.

[4] In its two-page comment, NARUC does not provide any reason for maintaining an opt-in requirement. Rather, NARUC simply states that it would "examin[e] its current position in light of [the Notice]" and may "file more extensive comments during the reply phrase of this proceeding." NARUC at 2.

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Furthermore, neither of these parties has even attempted to explain how an opt-in requirement is reconcilable with section 222(f), despite the Commission's express request for comment. See Notice (¶ 22). The opt-in proponents' only textual argument is that the "common sense usage" and "dictionary definition" of "approval" suggest "'knowing' approval," and that it is impossible to assure knowing approval under an opt-out regime. See Mpower at 5; EPIC at 6.

This analysis is inadequate for three reasons. First, no approval mechanism – not even opt-in – assures knowing approval. It is entirely possible that someone will receive an opt-in notice, not read it thoroughly or not understand it, and then opt-in without full knowledge of the consequences. Neither the Commission nor the carriers can guarantee knowing approval. The most we can do under opt-in or opt-out is provide the *means* for knowing approval – an unambiguous notice. Indeed, regardless of the form of approval, if the Commission's objective is to assure an informed approval, the best way to effect that is through adequate notice requirements. Second, neither the "common sense usage" nor the "dictionary definition" of "approval" suggests "knowing approval." If "approval" necessarily implied a "knowing" act, then Mpower would not need to speak – as it repeatedly does – of "knowing approval." That would be redundant. It would be akin to speaking of an "incorrect error." Indeed, the dictionary definition of "approval" does not connote a "knowing" decision at all. See Random House Webster's Unabridged Dictionary 103 (1999) (defining "approve" to include "speak or think favorably of," "agree to," and "confirm or sanction formally"). Third, the opt-in proponents'

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> Of the two commenters that do provide some analysis, only one of them, EPIC, opposes opt-out with respect to all CPNI. The other one, Mpower, opposes opt-out only with respect to customer-usage information, which is information about whom, where, and how often one calls. Mpower at 2, 4.

conclusion – that 'approval' necessarily means 'knowing approval' and that the only form of knowing approval is opt-in approval – is inconsistent with the Tenth Circuit's vacatur order. If in fact the statutory text mandated an opt-in requirement, there would have been nothing to remand to the Commission.

In any event, even if the opt-in proponents had succeeded in finding ambiguity in the word "approval" – which they have not – the Commission would still have to permit opt-out approval to avoid constitutional infirmities. Only one of the opt-in proponents so much as cites Central Hudson. And this advocate, EPIC, spends the bulk of its discussion of Central Hudson trying to show that an opt-in requirement satisfies the first prong of the test, a point which the Tenth Circuit, see US West, 182 F.3d at 1235-37, and AT&T, see AT&T at 5, assumed *arguendo*. As for the other two prongs of the Central Hudson test – the speech restriction materially advances the government interest, and the restriction is narrowly tailored – EPIC presents insufficient analysis. EPIC contends that "independent evidence" corroborates that an opt-out mechanism fails to protect the privacy of personal information,[5] but EPIC's "evidence"

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[5] EPIC does not argue that the government's interest in promoting competition or protecting consumers from the intrusion of telemarketing satisfies the Central Hudson test. Because no other opt-in proponent has seriously attempted to defend the constitutionality of an opt-in requirement, the Commission has not been given any basis for sustaining its opt-in rules on the basis of the government's asserted interest in promoting competition or protecting consumers from the intrusion of telemarketing.

Mpower complains that large incumbent carriers enjoy a competitive advantage as a result of their CPNI. See Mpower at 7-8. Mpower does not, however, make any effort to show that an opt-in requirement satisfies the Central Hudson test. Moreover, Mpower's objective of equalizing the position of competitors is not a valid pursuit for the Commission. See Hawaiian Telephone Company v. Federal Communications Commission, 498 F.2d 771, 774 (D.C. Cir. 1974) (explaining that equalizing competition among competitors "is not the objective or role assigned by law to the Federal Communications Commission"). Finally, Mpower's concern appears to be limited primarily to incumbents who have obtained the information "under monopoly

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does no such thing.

According to EPIC, the problem with opt-out is that it places the burden on the customer to take action; EPIC's implication is that some customers unwittingly will fail to secure the privacy of their CPNI. EPIC at 5. This "evidence" is constitutionally insufficient. As AT&T pointed out in its initial comments, AT&T at 7, the Supreme Court rejected a similar "customers cannot protect themselves" claim in United States v. Playboy. See 529 U.S. 803 (2000) (rejecting claim even though opt-out mechanism "put the burden of action on the subscriber") (quoting 141 Cong. Rec. 15586-15589 (1995) (statement of Sen. Feinstein) (internal quotation marks and alteration omitted). Because First Amendment interests are at stake, the Commission cannot presume that customers unknowingly will fail to protect themselves under an opt-out mechanism, even though the "burden" is on them. See id. at 822 ("[T]he Government must present more than anecdote and supposition."). At bottom, as AT&T Wireless explains, "[b]oth opt in and opt out consent requirements ensure that customers can control the use and disclosure of their CPNI, thereby enabling them to alleviate the potential threat to privacy posed by unrestricted use of personal information." AT&T Wireless at 8.

Next, EPIC posits that opt-out notices are generally "vague, incoherent, and often concealed in a pile of less important notices," and as a result, do not adequately inform the public of the exact nature of marketing uses and the availability of opt-out choices. EPIC at 5. Even if EPIC were correct that opt-out notices are frequently inadequate, that would not justify an opt-in

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> conditions." Mpower at 8. As AT&T has explained, only ILECs have obtained their CPNI under monopoly conditions, and the risk that ILECs' will use their CPNI to the detriment of other carriers is substantially addressed elsewhere in the Act. See AT&T at 8.

requirement. Under Central Hudson, any restriction on truthful commercial speech would have to be narrowly tailored. See Central Hudson, 182 F.3d at 565. The narrowly tailored response to inadequate opt-out notices is not the elimination of opt-out approval altogether, but rather the implementation of guidelines ensuring that opt-out notices are clear and conspicuous. See 16 C.F.R. § 313.4 (Federal Trade Commission rules for financial information); 12 C.F.R. § 40.4 (Office of the Comptroller of the Currency rules for financial information); 12 C.F.R. § 216.4 (Board of Governors of the Federal Reserve System rules for financial information); 12 C.F.R. § 332.4 (Federal Deposit Insurance Corporation rules for financial information); 12 C.F.R. § 573.4 (Office of Thrift Supervision rules for financial information).

Finally, EPIC contends that 86% of users of modern communications technologies favor an opt-in requirement. EPIC at 6. The Constitution, however, is not amended by public opinion polls. To the contrary, the whole point of a constitution is to place certain principles beyond the reach of majority preferences. Whether or not a majority of telecommunications customers favor an opt-in requirement, this requirement is unconstitutional. Thus, EPIC has not presented any cognizable "evidence" supporting an opt-in requirement.[6]

Mpower's arguments, which have no relevance to the constitutionality of an opt-in

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[6] In the final paragraph of its comments, EPIC suggests that customers expect their CPNI to remain confidential and that disclosing the CPNI could chill communications between free individuals. See EPIC at 6-7. EPIC does not, however, even purport to have evidence for these speculative assertions. Moreover, these assertions are based on an unrealistic view of customer behavior. As the Second Circuit has explained, "[m]any customers will not notice when their personal information is disseminated in violation of Section 222" and "those who learn of a violation may not even care." Conboy v. AT&T Corp., 241 F.3d 242, 251 (2nd Cir. 2001). See also CenturyTel, Inc. at ii ("[C]ustomers expect their telecommunications providers to use their CPNI to market them new services."); Verizon Wireless at 7 (explaining that "most local telephone customers expect their carrier to use CPNI to keep them apprised of various service offerings").

requirement, are even less availing. First, Mpower contends that opt-in is appropriate for customer-usage information because such information is personal – so personal that police cannot obtain it without a subpoena. Mpower at 4. The most that can be said about Mpower's argument is that it supports the obvious proposition that restrictions of CPNI implicate privacy. Mpower does not even attempt to show that an opt-in restriction materially advances the government's privacy interest or is narrowly tailored. AT&T agrees that some CPNI is personal information; however, a notice and opt-out mechanism adequately and effectively protects the customers' privacy interest. Second, Mpower argues that the European Union is currently reviewing legislative proposals that emphasize opt-in procedures whenever practical. Mpower at 5-6. However, even if the European Union adopts an opt-in requirement, that decision has no effect on the meaning of section 222 or the requirements of the United States Constitution, authorities to which the European Union is not subject.

In short, the opt-in proponents have failed to provide the Commission with any basis to maintain an opt-in requirement. The Tenth Circuit concluded that, on the record before it, an opt-in requirement could not pass constitutional muster. See US West, 182 F.3d at 1238-39. Because the opt-in proponents have not proffered any new evidence or analysis showing that an opt-in requirement survives the Central Hudson test, the Commission must permit opt-out approval.

II. SECTION 272 IMPOSES AN INDEPENDENT OBLIGATION ON BOCS NOT TO DISCRIMINATE BETWEEN THEIR AFFILIATES AND NON-AFFILIATES IN THE PROVISION OF CPNI.

In the Second Report and Order, the Commission concluded that "section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates." See Second Report and Order, 13 FCC Rcd. at 8179. In the Notice, the Commission determined that

the Tenth Circuit had not vacated this conclusion on the scope of section 272. See Notice (¶ 7); see also Clarification, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards, 66 FR 53545, 53545 (2001) ("Accordingly, we conclude that the court sought to eliminate only the specific section of our rules that was before it, and that its vacatur order applied only to § 64.2007(c), the only provision inextricably tied to the opt-in mechanism.") Nonetheless, recognizing that the choice of approval mechanism "could impact [its] previous findings regarding the interplay of [sections 222 and 272]," the Commission has sought comment on whether it should revisit its prior interpretation of the statute. Notice (¶ 24).

As AT&T explained in its initial comments, contrary to the Commission's conclusion in the Notice, the Tenth Circuit's vacatur affected those portions of the Commission's Second Report and Order concerning section 272, and thus the Commission should reconsider the interplay between section 222 and section 272. See AT&T at 11-12. The Tenth Circuit expressly vacated the entire order, including the discussion of section 272. See US West, 182 F.3d at 1228 ("We vacate the FCC's CPNI Order."); id. at 1240 ("[W]e VACATE the FCC's CPNI Order and the regulations adopted therein."). None of the commenters has offered an alternative explanation of the unambiguous language of the Tenth Circuit.

Moreover, even if the Tenth Circuit had expressly vacated only those portions of the order concerning the opt-in requirement, such disposition would have to be construed as implicitly vacating those portions of the order concerning section 272, because the Commission's decision to implement an opt-in policy was inextricably intertwined with the interpretation of section 272. See Final Rule, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, FCC 99-223, 64 FR 53242,

53257 (1999) (explaining that, if section 272 applies to CPNI, BOCs would face an insurmountable burden in soliciting opt-in approval); Second Report and Order, 13 FCC Rcd. at 8177 (explaining that an opt-in requirement "address[es] the competitive concerns implicated by a BOC's use of CPNI" and "render[s] the application of section 272's nondiscrimination requirement not essential"). Even one of the BOCs, BellSouth, agrees that the Commission's decision to implement an opt-in requirement played a role in the Commission's analysis of the scope of section 272. See BellSouth at 8. Although BellSouth contends that the Commission has alternative bases for affirming its construction of section 272, the BOC concedes that "the Commission considered its adoption of an opt-in approach as part of its analysis regarding Section 272(c)."[7]

At any rate, as AT&T and other parties explained in their initial comments, the Commission misconstrued section 272 in its previous CPNI orders. See AT&T at 12-16; ASCENT at 4 ("ASCENT submits that [reassessing the interplay between Sections 222 and 272] is required regardless of whether the Commission adopts an opt-out or an opt-in approach because the basis for the Commission's interpretation was erroneous."); Nextel at 9 ("[T]he non-discrimination mandate of Section 272 necessitates a requirement that a BOC's affiliates follow the same procedures as their competitors in obtaining CPNI from the BOC for the purpose of

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[7] SBC contends that the Commission's previous section 272 analysis did not depend at all on an opt-in approach. See SBC at 16. SBC is patently incorrect. As explained above, the Commission's decision to implement an opt-in policy was inextricably intertwined with the interpretation of section 272. The Commission itself has expressly recognized the connection between the two issues. See Notice (¶ 26) ("[U]nder the terms of Section 272, we found that the nondiscrimination requirements contained in that section would, *in the context of an opt-in approach*, 'pose a potentially insurmountable burden . . .' Although this was only one of several reasons supporting our interpretation of the interplay between Sections 222 and 272, we would likely have to revisit this conclusion if we adopt an opt-out approach as a final rule.") (emphasis added).

marketing new services."); WorldCom at 9 ("WorldCom maintains that, regardless of which approach the Commission adopts for carriers to obtain consent for use or disclosure of CPNI, the Commission must reverse its prior decision that section 272 does not impose any additional obligations on the BOCs with regards to the dissemination of CPNI.")

According to the Commission, the word "information," as used in section 272(c)(1), does not include CPNI, even though CPNI is defined as a type of "information," see § 222(h)(1). This reasoning is untenable. The only way to conclude that section 272 (which covers all "information") does not apply to CPNI (which is defined as "information") is to assign different meanings to the same word in the same statute. Doing that would run afoul of the Supreme Court's guidance on statutory construction and would undermine congressional intent. See United States v. Thompson/Center Arms Co., 504 U.S. 505, 512 n.5 (1992) ("Our normal canons of construction caution us to read the statute as a whole, and, unless, there is good reason, to adopt a consistent interpretation of a term used in more than one place within a statute."); Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995) ("[W]e adopt the premise that [a] term should be construed, if possible, to give it a consistent meaning throughout the Act.").

There is no reason apparent in the text or structure of the statute for attributing conflicting definitions to "information." Sections 222 and 272 are not in tension; section 272 simply imposes additional obligations on BOCs, and those obligations are not inconsistent with the requirements of section 222. As ASCENT explains, "there is nothing in either Section 222 or Section 272 that suggests that Congress intended to limit the reach of Section 272's non-discrimination safeguards only to certain forms of information, excluding others such as CPNI." ASCENT at 6. Rather, "[g]iven that Section 272 does not create an exception for CPNI, CPNI is merely a subset of the information Section 272 requires a BOC to provide on a non-

discriminatory basis." ASCENT at 4. Without doubt, "[t]he specific language of section 272 requires nondiscrimination by the BOC regarding the provision of information between its affiliated and nonaffiliated carriers." WorldCom at 11. The Commission itself has recognized that the scope of section 272 should not be narrowly cabined, but expansively construed. See Final Rule, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, 62 FR 2927, 2950 (1997) ("Non-Accounting Safeguards") ("We conclude that any attempt to define exhaustively the terms 'goods, services, facilities, and information' in section 272(c)(1) may unnecessarily limit the scope of this section's otherwise unqualified nondiscrimination requirement."); id. ("In enforcing the nondiscrimination requirement of section 272(c)(1), we intend to construe these terms broadly."); id. ("[W]e construe the term 'services' to encompass any service the BOC provides to its section 272 affiliate . . . ."); id. at 2951 ("[W]e find no limitation in the statutory language on the type of information that is subject to the section 272(c)(1) nondiscrimination requirement."); id. at 2950 ("[T]he protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate.")

Tellingly, none of the BOCs seriously defends the Commission's decision that the word "information" should be assigned two different meanings in the same statute. Instead, the BOCs present a litany of alternative arguments, which are no more persuasive now than they were when the BOCs first made them in 1996. The Commission did not adopt these arguments in its previous CPNI Orders, see, e.g., Second Report and Order, 13 FCC Rcd. at 8175 n.564, and the Commission should not do so here either.

The first of these arguments is that the "specific" controls the "general." According to Qwest and Verizon, section 222 specifically governs the use and protection of CPNI, whereas

section 272 generally refers to "information;" and, as such, section 222 should control section 272. Qwest at 26; Verizon at 8,10. The Commission has repeatedly rejected this very contention. See Final Rule, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information, 64 FR 53242, 53257 (1999); Order on Reconsideration and Petitions for Forbearance, In the Matter of Implementation of the Telecommunications Act of 1996; Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, 14 FCC Rcd. 14,409 (¶ 136) (1999); Second Report and Order, 13 FCC Rcd at 8174. And for good reason. Under the same principle of statutory construction, it can (and should) be said that section 272 specifically covers *the BOCs'* sharing of information with affiliates, whereas section 222 generally relates to *all carriers*. As such, section 272 should control section 222.[8]

Next, the BOCs argue that application of section 272 to CPNI would violate the First Amendment. Inter-affiliate speech, the BOCs contend, is commercial speech, and thus it is entitled to the protections of Central Hudson. According to the BOCs, restricting speech by applying section 272 cannot survive Central Hudson scrutiny. The BOCs analysis is thin, but underlying their reasoning is the assumption that, if section 272 were to apply, then BOCs could not share CPNI with their affiliates absent an "affirmative written request by the customer,"

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[8] Undercutting its own argument, Verizon acknowledges that section 222 and section 272 serve different purposes: Section 222 was enacted primarily to protect customer privacy, whereas section 272 furthers competition. Without explanation, Verizon suggests that this fact supports Verizon's position. It does not. To the contrary, the fact that sections 222 and 272 serve different purposes suggests, if anything, that neither is the specific nor the general. They both implicate CPNI, but with different objectives. Section 222 promotes consumer privacy by limiting all carriers in their use of CPNI. Section 272 promotes competition by limiting BOCs in their provision of services and information – including CPNI – to long-distance affiliates.

47 U.S.C. § 222(c)(2). See Verizon at 10; see also SBC at 23 (implying that application of section 272 to CPNI would entail an approval mechanism more restrictive than "opt-out," which SBC views as the "less restrictive alternative"). That assumption is flawed. Section 222(c)(2) simply provides that a carrier *must* disclose CPNI when a customer makes an "affirmative written request." Section 222(c)(2) does not provide that a carrier may not disclose CPNI absent an affirmative written request. In other words, section 222(c)(2) is a mandatory disclosure rule, not a restriction on disclosure. It does not limit the disclosure that is required elsewhere in the Telecommunications Act. Section 272, in turn, provides that, if the BOC shares CPNI with its affiliates after obtaining opt-out approval from the customer, then the BOC must share CPNI with third-party carriers after obtaining opt-out approval.[9] Neither the Tenth Circuit nor any

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[9] BellSouth and SBC assert (without any supporting analysis whatsoever) that application of section 272 to CPNI would present an insurmountable burden. BellSouth at 9; SBC at 19. As AT&T explained in its initial comments, however, any burden on BOCs would be insignificant, not insurmountable. See AT&T at 15. All the BOCs would have to do in order to comply with section 272 is obtain from the customer a blanket approval covering third parties as well as section 272 affiliates. Moreover, the BOCs' prior reasoning is even less persuasive if carriers can obtain consent through opt-out approval. An opt-out mechanism would further ease the burden on BOCs, which would no longer need to engage in extensive solicitation. A BOC could satisfy the requirements of section 222 and section 272 simply by sending a single notice to the customers informing them of their opt-out rights. See ASCENT at 5 ("Under an opt-out approach, Section 272, as well as Section 222, could be satisfied through transmission of a single notice to customers which provided them with the option of blocking disclosure of their CPNI to both BOC affiliates and unaffiliated competitors."); see also WorldCom at 11 ("[U]nder an opt-out approach, the BOC could comply with its [section] 272 obligations without undue burden.").

Such notice would adequately inform customers of their opt-out rights, notwithstanding BellSouth's and SBC's unsubstantiated assumptions to the contrary. See BellSouth at 9; SBC at 20. Indeed, this practice of providing blanket notice would be consistent with the one followed by financial institutions. Under regulations promulgated by the Federal Trade Commission, notice to financial customers need not list individually each third party that will receive the financial information absent a withholding of customer consent. See 16 C.F.R. § 313.6. See also ASCENT at 7 ("And the suggestion that

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BOC has made any suggestion that an opt-out mechanism would offend the First Amendment. Thus, application of section 272 to CPNI does not raise constitutional concerns.

Third, the BOCs argue that, even if section 272 restricts their ability to *provide* CPNI to an affiliate, they can still *use* CPNI to the benefit of the affiliate. See SBC at 23 ("[A] BOC's use of CPNI to market the services of a Section 272 affiliate does not constitute the *provision* of information and therefore is not subject to Section 272(c)(1)") (emphasis in original); see also BellSouth at 8 (incorporating argument from comments filed on March 17, 1997). In other words, the BOCs suggest that they themselves can use the CPNI to market the affiliate's products and services, without ever actually giving the CPNI to the affiliate. According to the BOCs, because such use is not the "provision" of information, it does not violate the nondiscrimination prohibitions in section 272. The problem with the BOCs' argument, however, is that it is a blatant end-run around the statute. The BOCs are trying to do exactly what the statute forbids – bestow a discriminatory benefit on a section 272 affiliate. Moreover, the BOCs are not even successful in avoiding the terms of the statute, which requires section 272 affiliates

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> customers cannot knowingly approve release of CPNI unless and until they are made aware of the identity of the party which is to receive the information is belied by Federal Trade Commission regulations which provide for disclosure of financial information based on descriptive references to categories of potential recipients.") (citation and internal quotation marks omitted). The same is true under rules jointly issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. See, e.g., 65 FR 35162, 35200 (2000). It is sufficient to state generally that financial service providers will receive the information, and to provide "illustrative examples such as mortgage bankers, securities broker-dealers, and insurance agents." § 313.6(c)(3)(i); see also 65 FR 35162, 35200 (same). AT&T sees no reason not to adopt this practice of financial institutions. Neither BellSouth nor SBC has presented any evidence that customers of financial institutions are confused by blanket approvals. In fact, SBC has cited with approval the opt-out practice of financial institutions in defense of its position on section 222(c)(1). See SBC at 12-13.

to "operate independently from the [BOC],"[10] § 272(b)(1), and which prohibits a BOC from discriminating in the provision of "services" as well as "information," §272(c)(1). The ordinary meaning of a "service" (which is not defined in the statute) is "an act of helpful activity." *Random House Webster's Unabridged Dictionary* 1750 (2001). Surely, providing a carrier with all of the benefits of invaluable CPNI is a "helpful activity" and thus a "service."[11] There is no basis for construing the word more narrowly than in its common, every-day usage. Indeed, as the Commission has made clear, "[it] construe[s] the term 'services' to encompass *any* service the BOC provides to its section 272 affiliate." Non-Accounting Safeguards, 62 FR at 2950 (emphasis added).

The BOCs contend that, notwithstanding section 272(c)'s prohibition on discrimination,

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10 As AT&T explained in its initial comments, because a section 272 affiliate must "operate independently" from the BOC, the affiliate may not obtain special assistance from the BOC or derive a competitive advantage from any relationship with the BOC. See AT&T at 14; see also Second Report and Order, 13 FCC Rcd at 8179, ¶ 168 (describing the purpose of section 272 as "ensur[ing] that BOCs do not give affiliates a competitive advantage"). Consequently, the BOC cannot use CPNI to market the products of its section 272 affiliates. Far from "operat[ing] independently," the affiliate would owe much of its success to the valuable asset that the BOC effectively gifted to the affiliate. Moreover, this gifted CPNI cannot be considered mere joint marketing. As explained below, joint marketing can and will proceed without any use of CPNI. See infra 19-20. The gift of CPNI is a separate action, independent of any joint marketing.

11 Similarly, section 272's nondiscrimination provisions prohibit BOCs from soliciting customer approval to share CPNI only with affiliates. Such solicitation would be an end-run around the statute as well. Moreover, notwithstanding SBC's hurried argument to the contrary, this solicitation would plainly be a "helpful activity" and thus a "service" to the affiliate. Finally, the Commission has already concluded that there is "no principled basis" to permit such solicitation if it is determined that section 272 requires BOCs to disclose CPNI to unaffiliated entities on the same approval terms as they share with their section 272 affiliates. See Second Report and Order, 13 FCC Rcd. at 8176-77. As the Commission put it, "if section 272's non-discrimination obligation applies to the form of customer approval, we agree that it would also apply when BOCs solicit customer approval to share with their statutory affiliates." Id.

this activity is permitted by section 272(g)(3), which provides that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of [section 272(c)]." See Qwest at 28 ("[S]hould the Commission determine that Section 272(c)(1) has any relevance to CPNI, it must simultaneously find that the CPNI 'information' can be used without regard to the nondiscriminatory requirements of that Section, in light of the exemption in Section 272(g)(3) permitting its use in joint marketing."); SBC at 24 ("[U]nder section 272(g)(3), a BOC's use of its CPNI to engage in exclusive joint marketing of the interLATA services of its section 272 affiliate, which is permitted under Section 272(g), is not subject to the nondiscrimination obligations of section 272(c)(1)."); Verizon at 10 ("[The] right to joint market expressly overrides the nondiscrimination requirements of section 272(c)."); see also BellSouth at 8 (incorporating argument from comments filed on March 17, 1997). According to the BOCs, all they are doing when they use CPNI to market an affiliate's services is "joint marketing," an activity that is outside the scope of section 272(c). There are two problems with the BOCs' logic.

First, the BOCs are doing far more than mere "joint marketing" when they use CPNI in this manner. Joint marketing can, and surely will, proceed without the use of BOC CPNI. For instance, a BOC affiliate can develop and offer to all consumers an integrated package of local and long-distance service. More broadly, either a BOC or its section 272 affiliate can launch a television or magazine-advertisement campaign offering local, long-distance, and internet access. Similarly, either the BOC or its section 272 affiliate can conduct a direct-mail advertising campaign using subscriber lists that have not been segmented based on the subscriber's level of usage of the BOC's telecommunications services. Either the BOC or its affiliate can conduct direct mail or telemarketing campaigns based on third-party sources of demographic information

about subscribers. And a BOC or section 272 affiliate can elect to send direct mail advertisements only to customers residing in certain zip codes or to telemarket to customers in certain telephone exchanges, all without accessing BOC CPNI. The possibilities for joint marketing activities without using BOC CPNI are, quite literally, endless. Thus, the Commission cannot conclude that BOC use of CPNI to promote an affiliate's services is simply "joint marketing." Such use of CPNI is an additional service, independent of joint marketing.

Second, in any event, section 272(g)(3) says nothing about the scope of section 272(e)(2), which prohibits a BOC from "provid[ing] any facilities, services, or information concerning its provision of exchange access to the [section 272 affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions." Section 272(e)(2) applies to CPNI because CPNI is "information concerning" the end users to which the BOCs' exchange-access services connect interexchange carriers. Section 272(g)(3) simply provides an exemption from "the nondiscrimination provisions of subsection (c) of [section 272]"; it does nothing to the breadth of 272(e)(2). Thus, even if the Commission were to read "joint marketing" as broadly as the BOCs request, the Commission could not let the BOCs use their CPNI to market an affiliate's products. Section 272(e)(2) prohibits such activity by the BOCs.

Finally, the BOCs present two policy arguments in support of their position on section 272. Neither argument is persuasive. First, according to Verizon, the Commission should permit BOCs to share CPNI with their affiliates because the affiliates enter the market without any market share and thus are not a likely threat to competition. See Verizon at 11. What Verizon overlooks, however, is that the BOCs' affiliates would be a threat to competition if they had unfettered access to the BOCs' robust CPNI. See Nextel at 12 ("Given the BOCs'

large customer base and store of CPNI, the resulting competitive disparity between the BOCs' affiliates and their competitors would implicate directly the purpose of Section 272 to ensure that BOCs do not give their affiliates a competitive advantage.") (internal quotation marks and citation omitted); see also id. at 9 ("Allowing BOCs to share CPNI with their affiliates through an opt-out mechanism for the purpose of marketing new services, while requiring that the customer submit an affirmative written request before such information may be disclosed to the BOCs' competitors, would create unacceptable competitive asymmetry."). A section 272 affiliate's market power stems from its relationship with the BOC. It is to curtail abuse of that market power that section 272 requires the BOC to act in a nondiscriminatory fashion. Verizon's argument is nothing more than a collateral attack on Congress's decision to enact section 272 in the first place; if valid, this argument would suggest that section 272 is completely unnecessary. Moreover, even if Verizon were correct in its unsubstantiated prediction of the likelihood of the threat to competition, Verizon's speculative policy argument cannot overcome the plain language of section 272, which unmistakably applies to CPNI.

Second, Qwest argues that, because interexchange carriers can share their CPNI with their affiliates, BOCs should enjoy the same benefit and thus be able to share their CPNI with their affiliates. See Qwest at 27. AT&T has no objection to a BOC being able to share CPNI with its affiliates, provided the BOC complies with the Telecommunications Act. Under the Act, the BOC cannot discriminate in the provision of information, and thus the BOC must share CPNI with third-party carriers on the same terms and conditions as the BOC shares with its affiliates.[12]

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[12] As AT&T explained in its initial comments, application of section 272 to CPNI requires only one modification to the "total service approach." See AT&T at 16-17. Under the total service approach, if a customer obtains local service from a BOC and long-distance service from the BOC's affiliate, the BOC can share CPNI with the affiliate, without any

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No provision of the Act imposes a similar obligation on interexchange carriers.

CONCLUSION

The Tenth Circuit concluded that an opt-in requirement could not be sustained on the record before the court. The current record is no more supportive of an opt-in requirement. Because allowing opt-out approval furthers the Commission's policy goals, and because an opt-in requirement violates the text of section 222 and the First Amendment of the Constitution, the Commission must permit opt-out approval.

The Commission's previous interpretation of section 272 – which assigns two conflicting meanings to the word "information" – cannot be reconciled with the Supreme Court's decisions on statutory interpretation and the intent of Congress. The BOCs have abandoned the Commission's reasoning and have instead pursued alternative arguments, which are no more persuasive and no more consistent with the plain text of the statute. The Commission should reject the BOCs' misguided analysis and apply section 272 according to its terms. Section 272 plainly prohibits BOCs from discriminating between their affiliates and non-affiliates with respect to CPNI; thus, whatever form of approval BOCs use to share CPNI with affiliates, BOCs must use that form to share CPNI with third-party carriers.

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> opt-in or opt-out approval. See Second Report and Order, 13 FCC Rcd. at 8100, 8177. To accommodate section 272, the total service approach should be amended to preclude BOCs from sharing CPNI with their long-distance affiliates absent approval obtained on the same terms and conditions as applicable to third parties.

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November 16, 2001

APPENDIX A	
Commenter	***Abbreviation***
ALLTEL Communications, Inc.	ALLTEL
Association of Communications Enterprises	ASCENT
AT&T Corp.	AT&T
AT&T Wireless Services, Inc.	AT&T Wireless
ATX Technologies, Inc.	ATX
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
CenturyTel, Inc.	CenturyTel
Cingular Wireless LLC	Cingular
Direct Marketing Association	DMA
Electronic Privacy Information Center, et al.	EPIC
IntelliOne Technologies Corp.	IntelliOne
Mpower Communications Corp.	Mpower
National Association of Regulatory Utility Commissioners	NARUC
National Telephone Cooperative Association	NTCA
Nextel Communications, Inc.	Nextel
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Qwest Services Corporation	QWest
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
United States Telecom Association	USTA
VarTec Telecom, Inc.	VarTec
The Verizon telephone companies	Verizon
Verizon Wireless	Verizon Wireless
WorldCom, Inc.	WorldCom

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2001, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: November 16th, 2001
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Patricia A. Bunyasi

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